

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

NATIONAL LAWYERS GUILD, SAN
FRANCISCO BAY AREA CHAPTER,

Petitioner and Respondent,

v.

No. A149328

CITY OF HAYWARD, a municipal
corporation; ADAM D. PEREZ, in his
official capacity as Records
Administrator, City of Hayward,
California, Police Department; DIANE
URBAN, in her official capacity as
Chief of Police, City of Hayward,
California; DOES 1-50, in their official
capacity for the City of Hayward,

Respondents and Appellants.

APPELLANTS' RESPONSE TO AMICI CURIAE BRIEF

Alameda Superior Court Case No. RG15785743

Hon. Evelio Grillo

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, Rule 8.208(e)(3)).

Dated: September 21, 2017



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INTRODUCTION

The Amici Curiae Brief (“Brief”) submitted by The Reporters Committee For Freedom of the Press and Seven Media Organizations (“Amici”) confuse the issue that is actually before this Court.

At various points in its Brief, the Amici reference body-camera videos that have garnered national attention. In essence, the crux of the Amici’s argument is that if the Court aligns with the City, the costs imposed onto a requester would effectively put such videos out of reach.

It is critical to note the following fact- the Amici’s referenced videos, the ones which the Amici highlight in their brief, would likely not cost a requester anything. At most, the production costs for these referenced videos would be equivalent to the cost of a couple extractions. As is the case with the vast majority of body-camera videos, the videos referenced by the Amici have very little, if any, exempt material within them, requiring minimal extractions, and thus, not costing the requester much, if anything at all.

For instance, the Keith Lamont Scott video would have required only a few broad medical information edits. (Brief, p. 14, extractions occurring between 1:46-13:30). The Samuel Dubose video had perhaps two extractions of medical information. (Brief, p. 14, possible extractions between 1:18-1:39). All other referenced videos do not require any edits whatsoever. (Brief, p.

15, video of police planting evidence and video of officer's use of excessive force). Videos referenced in the Amici's Brief, if possessed by the City, would likely be provided free of charge. (*See*, JA p. 237:3-9). The narrative provided by the Amici does not fit the law or facts.

Editing the videos referenced by the Amici would not require significant resources to make available to the public. However, in the matter before this Court, in order to service the NLG's request, the City was tasked with reviewing several hours of video requiring dozens of hours of extractions.

The Amici's arguments illustrate a fundamental misunderstanding. The question is not whether all videos should cost the same as the subject videos provided to the NLG. The question is, rather, whether a requester may be invoiced the costs of extracting exempt sensitive material from a video.

Through the course of its brief, the Amici point to various reasons why a ruling in the NLG's favor would benefit media organizations. Mostly, these arguments are premised on the assumption that all body-camera records will cost a requester exorbitant amounts of money, cutting into media profit margins. The City will address this argument. But additionally, albeit briefly, the Amici touch upon some of the legal arguments presented by the parties, which the City will address first.

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ARGUMENT

I. The Amici Effectively Concede That The Law Does Not Support The NLG's Statutory Interpretation.

Never once does the Amici's brief comment on the legislative history. This is because Government Code §6253.9(b) has an undeniable legislative intent. The legislature meant for the costs associated with extracting exempt material from an electronic record to be assumed by the requester. The Amici's silence on this point is instructive.

Though the legislative history is never acknowledged, the Amici do make claims as to legislative purpose: "Appellants' interpretation of Section 6253.9 is contrary to the California Constitution and the purpose of the CPRA." (Brief, p. 10). Both the California Constitution and the Public Records Act state that privacy is always to be considered ("Nothing shall supersede or modify the individual's fundamental right to privacy." Cal. Const. art. I, §3(b)(3); "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy . . ." Govt. Code §6250). Producing documents pursuant to the NLG's request required the removal of exempt medical information and security procedures. Extracting this information as authorized by §6254, effectuating the privacy protections therein, reflect the purpose of the foundational privacy language in both the California Constitution and the Public Records Act ("CPRA").

The other legal argument offered by the Amici considers its interpretation of the CPRA. The Amici suggest that “[w]hen the CPRA requires a public agency to release an electronic record, the agency cannot delay or complicate release by imposing barriers, such as additional costs.” (Brief, p. 10). From what can be gleaned, the Amici seem to claim that extraction costs are unauthorized. The Amici’s statement here is a direct contradiction to the plain language of §6253.9(b), that being that certain costs are explicitly authorized and may be imposed by an agency. Both the NLG and City agree on this point, both parties believing that costs can be invoiced for extractions, though interpretations differ concerning what is meant by the term “extraction.” A significant departure is made by the Amici.

Other legal offerings by the Amici are generally absent of any case law or statutory support, and should accordingly be dismissed as merely conclusory.

II. The Public Policy Arguments Set Forth By The Amici Misinterpret The Facts, And Fail To Recognize The Public Benefits Of §6253.9(b).

The law and its plain meaning should guide the Court’s decision here. Plain meaning and legislative intent override any policy arguments put forth by any of the parties.

Yet, generally a law is symbolic of a larger policy or principle, and though the Amici fail to provide supporting law, the rhetoric the Amici promulgate should be addressed. The

Amici's Brief presents why it believes news agencies should not be required to pay beyond the direct costs of production for electronic records requiring sanitization. Below, the City addresses the Amici's public policy claims. In doing so, the City seeks to A) clarify facts where there may be some confusion concerning paper records, B) address the Amici's consternation as to extraction costs, and ultimately, C) explain why transparency is furthered rather than hindered by §6253.9(b).

A. No Charges Were Imposed by the City for the Paper Records Provided to the NLG.

Paper records are often referenced by the Amici. There seems to be some confusion as to the facts here before this Court. The City is not disputing that paper records should be invoiced the direct cost of duplication. When responding to the NLG's initial CPRA request, the City produced a plethora of redacted records, including the emails of Hayward Police Department supervisors, private reports, volumes of data and logs, all provided to the NLG free of charge. No charges were imposed for these paper records whatsoever, for neither those records with redactable material or those without.

Though these documents may have been stored and delivered electronically, they are fundamentally paper, to which *North County Parents Organization* is still the operative law. (*N. Cty. Parents Org. v. Dep't of Educ.* (1994) 23 Cal.App.4th 144). Thus, the claims made by the Amici over cities possibly later charging for paper records has little bearing in this matter.

B. Police Videos Typically Do Not Contain Much Exempt Material, Therefore There Will Be Little Impact On Media Bottom-Lines.

A major focus by the Amici is on its own financials. There is no denying that the language in §6253.9(b) authorizing a city to impose certain costs will cut into media company bottom-lines, however minimal that imposition may be.

Still, it cannot be overstated that most body-camera videos do not have anywhere near the volume of exempt material as the ones requested by the NLG. If the body-camera videos referenced in the Amici's Brief are to be considered reflective of body-camera videos generally, and they should, then there will be little to no impact on media budgets to access body-camera footage. Most requests do not necessitate extracting enormous amounts of exempt material from several hours of videos.

The facts here are distinct. Six hours of videos were reviewed after the NLG agreed to temporarily narrow its request. (JA, p. 353, "for now we can narrow that request to the following times . . ."). Such voluminous requests with overwhelming amounts of exempt material are the exception, not the norm.

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C. There is a Significant Difference Between Our Memory of Michael Brown Versus Eric Garner.

The final moments of Eric Garner's life are not a mystery. We saw him die. We saw exactly how it happened. There is a difference between how his death will be remembered versus the death of Michael Brown. With Michael Brown, many may intuitively understand that he died in vain, but for some, there will always be doubt as to what happened in his final moments. No one, other than the officer who took his life, saw how he died. This is important. And as the Amici point out, this is one of the values, if not the greatest value, in body-cameras. But the key to enjoying a body-camera's benefits is that a body-camera must exist in the first place.

Unfortunately, contrary to statements made by the Amici, far too few agencies utilize body-cameras. While the numbers of agencies using body-cameras is growing, body-cameras are still the exception rather than the rule, only garnering the support of roughly 20 percent of California agencies. (KPBS, Number of California Police Department With Body Cameras Growing (April 2, 2015), <http://www.kpbs.org/news/2015/apr/02/number-california-police-departments-body-cameras-/>; *See also*, National Institute of Justice, Research on Body-Worn Cameras and Law Enforcement (modified on June 12, 2017) <https://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx>). The

precise reasons vary from agency to agency as to why body-cameras have not been implemented, but largely, the reasons are financial. (Detroit Free Press, Costs of Police Body Cameras Raise Concern (June 6, 2016), <http://www.freep.com/story/news/local/michigan/2016/06/06/police-body-cameras-high-costs/85356518/>).

Lessening the financial strain associated with editing out private exempt material is not only plainly authorized by §6253.9(b), it also promotes transparency. In addition to allowing the release of otherwise exempt electronic records, §6253.9(b) helps encourage the adoption of body-cameras where they are absent. It removes a significant financial obstacle. It puts some agencies one step closer towards implementation.

Again, there is a difference between Eric Garner and Michael Brown. Every police interaction should be recorded. Truth deserves preservation. Moving the needle closer to this reality requires making body-cameras economically feasible, which is what §6253.9(b) helps accomplish. A media company's financial interests should not overcome this significant public interest.

CONCLUSION

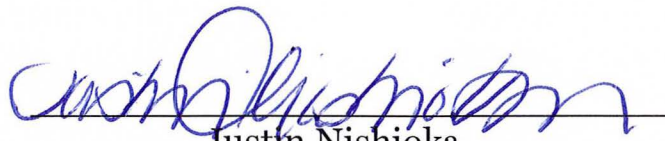
At the center of this matter is a protest where people gathered in Berkeley to illuminate the senseless killings of

Michael Brown and Eric Garner. Protests, if captured on body-camera video, create copious amounts of exempt, private information. The security procedures utilized to preserve public safety at a protest are unlike nearly all other police activities. The time spent on the editing of the videos here, along with the associated costs, is not reflective of body-camera videos generally. It is only reflective of the unique burdens that the NLG's CPRA request placed on the City in this specific situation. Again, this is why the legislature integrated §6253.9(b)- it hoped to allay the economic strain for these types of burdensome requests.

The Amici's Brief rests primarily on conclusory unsupportable statements and a desire for this Court to consider the Amici's profit margins and bottom-lines. But bottom-lines do not protect those persons who are recorded in their most horrific and vulnerable situations. Bottom-lines do not protect information that is shielded to foster officer safety. Public viewing of body-camera video is essential, yes, this is indisputable, but as essential are the privacy protections provided in §6254. Ignoring the privacy protections present in the CPRA ignore one of its foundational mandates- mindfulness to the right to privacy. Video is not the only thing that was produced to the NLG. The City also made public certain insights into the lives of people. Actual people. People who deserve protection. This is something that a bottom-line will never understand.

As to where the parties ultimately stand on this issue of privacy versus transparency, the parties are not far apart and neither are the Amici. Transparency is essential to a virtuous society. But privacy should not be forgotten, placed in the shadows, or given a back seat. It deserves our attention, just as Eric Garner, and Michael Brown, and so, so many others.

Dated: September 21, 2017

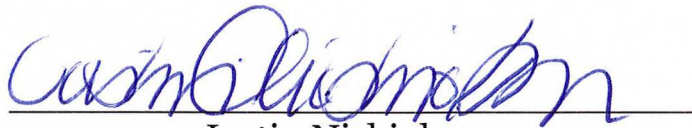
A handwritten signature in blue ink, appearing to read "Justin Nishioka", is written over a horizontal line.

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**CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c))**

The text of this brief consists of 1999 words as counted by the Microsoft Word 2016 version word-processing program used to generate the brief.

Dated: September 21, 2017



Justin Nishioka
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STATE OF CALIFORNIA
Court of Appeal, First Appellate District

**PROOF OF
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(Court of Appeal)

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v. City of Hayward et al.**

Court of Appeal Case Number: **A149328**

Superior Court Case Number: **RG15785743**

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